

ORIGINAL

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
JUL 28 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)
Annual Assessment of the Status of)
Competition in the Market for the) CS Docket No. 95-61
Delivery of Video Programming)

To: The Commission

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS
OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

By: John B. Richards
John Reardon

Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210
Its Attorneys

Dated: July 28, 1995

No. of Copies rec'd
List A B C D E

079

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

RECEIVED
JUL 28 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)
Annual Assessment of the Status of)
Competition in the Market for the) CS Docket No. 95-61
Delivery of Video Programming)

To: The Commission

REPLY COMMENTS
OF
THE NATIONAL RURAL TELECOMMUNICATIONS COOPERATIVE

Pursuant to Section 1.430 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission"), the National Rural Telecommunications Cooperative ("NRTC"), by its attorneys, hereby submits these Reply Comments concerning the state of competition in the market for delivery of video programming.¹ NRTC submits that there will not be full competition in the market for delivery of video programming until the Commission prohibits exclusive arrangements between vertically-integrated programmers and non cable operator distributors in areas unserved by cable. Further, the rules must provide for the recovery of damages -- at least in the amount of demonstrated overpayments -- by

¹ Notice of Inquiry ("Notice"), 60 Fed. Reg. 29533 (released May 24, 1995).

those distributors clearly and demonstrably injured due to violations of the Program Access rules.

I. REPLY COMMENTS

1. Satellite technology is uniquely suited to provide telecommunications services to rural America due to the fact that the cost of satellite service -- unlike wire services -- is unrelated to subscriber location. With satellites, the cost of providing access to the most distant, rural subscriber is the same as for an urban dweller. In all likelihood, many of the more remote areas of the country will never be "passed" by cable, nor served by fiber optic systems. All Direct-to-Home ("DTH") satellite services provide their services to subscribers pursuant to the Statutory Copyright License for satellite delivery of commercial superstations and network signals. In an attempt to preserve the network affiliate system, only unserved households in "white areas" are eligible to receive network signals by satellite. This white area provision enables affiliates to challenge households receiving DTH network signals within an affiliate's service area. Satellite carriers are required to either terminate service or perform an engineering field test.

2. To the dismay of DTH providers, network affiliates have challenged tens of thousands of households within their service areas. This avalanche of paper has placed a substantial financial burden on the satellite carriers delivering the signals.

Rather than assume the costs for testing such a large number of subscribers, carriers, including NRTC, are forced to simply terminate service, even to households which qualify as unserved. NRTC agrees with PrimeTime 24 that Congressional action is needed to rectify this serious problem. PrimeTime 24 at 3.

3. NRTC believes that the prohibition against services such as DBS offering programming of network affiliated broadcast stations is unnecessary. These impediments block the distribution of network signals via satellite to those subscribers who wish to purchase them. Program providers such as NRTC are not in competition with local network service, instead they substitute for the missing local signals in predominantly rural areas by providing the rural network programs that dish owners find so important and which are otherwise unavailable to them. Most of NRTC's subscribers are located in rural areas; for them, satellite technology provides the sole access to information, entertainment, and educational programming. As PrimeTime 24 points out, satellite-delivered programming actually strengthens the networks' appeal. PrimeTime 24 at 4

4. NRTC supports the views of Satellite Receivers, Limited ("SRL") that cable programmers impose wholesale rates for C-Band and DBS distribution of programming and that these wholesale rates are much higher than rates charged by the programmers themselves to cable and other distribution technologies. SRL at ¶ 4. NRTC agrees with SRL that price discrimination continues to exist. Id.

5. In its comments, Time Warner Cable ("TWC") declared that the Commission was "flatly wrong to conclude" in response to a Petition for Reconsideration by NRTC (Memorandum Opinion and Order on Reconsideration of the First Report and Order, MM Docket No. 92-265, December 9, 1994), that the Commission has authority to award damages in a Program Access dispute. TWC at 27. TWC even threatened to pursue its challenge to the legality of those Program Access provisions and the Commission's regulations to the fullest extent possible. Id.

6. As one of the largest vertically-integrated cable programmers, TWC's position against an award of damages for a Program Access violation is predictable, but untenable. The Commission has ample authority under the Cable Consumer Protection and Competition Act of 1992 ("1992 Cable Act") to order "appropriate remedies" for Program Access violations. 47 U.S.C. § 628(e)(1). Far from being "flatly wrong," as TWC claims, the Commission correctly determined that it possesses clear statutory authority to award damages in price discrimination actions. TWC's motivations in attacking the Program Access rules are transparent; as the largest vertically integrated programmer, TWC simply has the most to lose from real competition.

7. In response, NRTC believes it is time for the Commission to exercise its authority against TWC and other vertically integrated programmers who continue to control the market for delivery of video programming. NRTC agrees with SRL

that, by refusing to exercise its authority to award damages in actual cases, the Commission is depriving satellite distributors of the strongest weapon in their fight against price discrimination by vertically integrated programmers. SRL at ¶ 5. NRTC urges the Commission at least to permit the recovery of documented overpayments. Far from being exorbitant or punitive, restitution simply returns what was unjustly taken in the first place.

8. NRTC also agrees with SRL that vertically integrated programmers can continue under the status quo to impose unjustified discriminatory rates with impunity and to retain the overpayments without liability. SRL at ¶ 6. Meanwhile, distributors must continue to pay unjustified discriminatory rates without recourse. A distributor could file complaint after complaint against unfair programmers, prove that their rates are not justified, and still not recover a penny of the overpayment because of the Commission's refusal to act. NRTC urges the Commission to enable NRTC and others similarly situated to recover unjustified overpayments paid to programmers. Without the possibility of an award of damages to an aggrieved distributor following successful prosecution of a complaint at the Commission, there is little incentive for an MVPD even to initiate an action at the Commission.

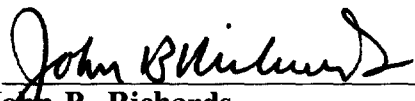
WHEREFORE, THE PREMISES CONSIDERED, the National Rural Telecommunications Cooperative urges the Commission to consider these Reply Comments as part of its Annual Report to Congress as the Status of Competition in

the Market for the Delivery of Video Programming, and to revise its rules in accordance with the views expressed herein.

Respectfully submitted,

**NATIONAL RURAL
TELECOMMUNICATIONS COOPERATIVE**

**Steven Berman,
Vice President, Business Affairs
and General Counsel**

By: 

John B. Richards
John Reardon

**Keller and Heckman
1001 G Street, N.W.
Suite 500 West
Washington, D.C. 20001
(202) 434-4210**

Its Attorneys

Dated: July 28, 1995